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No. 06-39

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,

CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition implicitly concedes that, if the modified per stirpes rule set out in a comment to Section 301 of the Restatement (First) of Property was in force in Hawaii when Samuel Mills Damon died in 1924, the Hawaii state courts, in construing the corpus distribution of the Damon will, should have set the stirpital root at the level of Mr. Damon's great-grandchildren as the first living generation of takers. Rather than grapple seriously with the due process implications of the Hawaii courts' retroactive application of a rule first adopted in 1995, the respondents in opposition spend most of their brief raising supposedly insurmountable procedural obstacles to this Court's consideration of the question presented in the Petition and attacking the property law predicates to Petitioner's due process claim. As demonstrated below, the procedural arguments raised by the respondents in opposition are based on an unduly restrictive view of this Court's jurisdiction, and their state law attacks on Petitioner's due process claim are unsupported by the law of Hawaii.

To the extent that the respondents in opposition address Petitioner's due process claim at all, they argue that, in civil cases, state courts are completely unconstrained in their ability to create new rules of law and apply them retroactively to diminish the rights of the parties before them. That contention, however, runs headlong into this Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Bouie* did not, as the opposing respondents assert, merely give constitutional character to the fundamental rule of lenity that applies in all criminal proceedings. Rather *Bouie* established clear limits on the power of state courts to apply retroactively new and unforeseeable rules to the parties before them. And as the late Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* makes clear, those limits apply whether the proceedings are criminal or civil. The petition for a writ of certiorari should be granted.

I. PETITIONER PROPERLY PRESENTED HIS DUE PROCESS CLAIM TO THE COURTS OF HAWAII

The respondents in opposition first contend (at 3-6) that this Court lacks jurisdiction to entertain the Petition because Petitioner did not "specially set up or claim[]" the denial of a federal right before the state court. 28 U.S.C. § 1257(a). Relying principally on this Court's per curiam decision in *Adams v. Robertson*, 520 U.S. 83 (1997), they argue that this Court lacks jurisdiction under Section 1257 unless the litigant before the state court explicitly incants the particular provision of federal law on which he or she relies. *See* Opp. Br. 4 (citing *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897)). But *Adams* does not remotely establish so exacting a standard. As *Adams* itself recognizes, where, as here, the state court has refused to address a petitioner's federal law claim, a petitioner must establish only that "the state court had 'a fair opportunity to address the federal question that is sought to be presented.'" 520 U.S. at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). While a "mere inference" will not suffice to raise a claim of federal right, "no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted." *Green Bay & Miss. Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 67 (1898). Rather, this Court's jurisdiction may be called upon whenever "the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This may be accomplished in "various ways." *Id.* Where the record as a whole shows – "by clear and necessary intendment" – that the federal question must have been directly involved, "the claim is to be regarded as having been adequately presented." *Id.*; *see also Green Bay & Miss. Canal*, 172 U.S. at 67-68; *Bridge Proprietors v. Hoboken Co.*, 68 U.S. 116, 143 (1864).

Petitioner's presentation of his due process claim to the Hawaii Supreme Court far exceeded this "minimal requirement." *Adams*, 520 U.S. at 89 n.3. Petitioner first raised his due process claim in his opening brief to the Hawaii Supreme Court, where he argued that the probate court's identification of *Trust Estate of Dwight*, 909 P.2d 561 (Haw. 1995), as controlling precedent to determine the distribution of the corpus upon the termination of the trust had nullified the intent of the testator at the time of his death in 1924, and retroactively employed a new rule to divest Petitioner of rights in property he had held since birth. Pet. App. 63a. And he explicitly invoked the Constitution on page five of his reply brief: "A retroactive or retrospective law, *in a constitutional sense*, is one that takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transaction or considerations already passed. *Employees' Ret. Sys. v. Wah Chew Chang*, 42 Haw. 532 (1958)." *Damon II*, Reply Brief of Christopher J.D. Haig at 5 (emphasis added).[1] The Reply Brief goes on to cite a number of state cases that discuss at length the constitutional issues raised by a law's retroactive

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[1] That Petitioner's reply brief in the Supreme Court of Hawaii did not specifically identify the United States Constitution is inconsequential. Where a right under state law is coextensive with the corresponding right under federal law, the identification of the state law claim will suffice to present to the state court both the state and the federal issue. *Jackson v. Edwards*, 404 F.3d 612, 621 (2d Cir. 2005); *see also Howell v. Mississippi*, 543 U.S. 440, 445 (2005) (per curiam) (reserving the question whether presentation of state law claim fairly presents identical claim under federal law). There is no significant difference between the rights accorded by the Due Process Clause of the Constitution of the State of Hawaii, and that of the 14th Amendment to the U.S. Constitution. *See Hawaii v. Silva*, 890 P.2d 702, 704-05 (Haw. Ct. App. 1995); *see also Hawaii v. Culkin*, 35 P.3d 233, 253 (Haw. 2001) ("[W]e are 'under the obligation to construe the state constitution, not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting those interpretations for our state.'"(citation omitted)).

application. Reply Br. at 5. Importantly, a number of those state cases look to Justice Story for his definition of "retrospective law." *See Wah Chew Chang*, 42 Haw. at 535-36; *Graham Constr. Supply, Inc. v. Schrader Constr., Inc.*, 632 P.2d 649, 652 (Haw. 1981). And one case cited, *Roe v. Doe*, 581 P.2d 310 (Haw. 1978), considered whether the retrospective application of a longer limitations period for paternity actions would violate the right to due process under the federal *and* state Constitutions.

The Supreme Court of Hawaii had more than a "fair opportunity" to address Petitioner's due process claim. It simply and steadfastly refused to do so. Such intransigence cannot deprive this Court of jurisdiction under Section 1257. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973) (holding that state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point).

II. THERE IS NO INDEPENDENT STATE GROUND CAPABLE OF JUSTIFYING THE REJECTION OF PETITIONER'S DUE PROCESS CLAIM

The respondents in opposition suggest that there were adequate and independent state law grounds for the rejection of Petitioner's federal due process claim. Specifically, the respondents in opposition argue that the Hawaii courts' construction of the Damon will pursuant to state law and Petitioner's failure to comply with state procedural rules each constitute independent justification for the state court's retroactive application of a new rule to diminish Petitioner's rights in property. *See* Opp. Br. 6. These arguments are just makeweight.

As to the first, Petitioner asserts that the Hawaii courts' construction of the Damon will – specifically, its corpus distribution provision – itself violated Petitioner's due process rights under the 14th Amendment to the United States Consti-

tution. A state law ground cannot be viewed as independent where it is so tightly "interwoven" with the federal claim. *See also Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); *Coleman v. Thompson*, 501 U.S. 722, 735 (1991); *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931) (citing *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912)).

As to the second, respondents in opposition argue that Petitioner failed to timely raise his federal claim before the probate court and the Supreme Court of Hawaii. But Petitioner's due process claim – which is based on the retroactive *application* of new law – could not have become ripe before the probate court actually *applied* the new rule to diminish Petitioner's rights in property. And as discussed above, Petitioner raised his newly ripe federal law claim at the first available opportunity – in his opening brief to the Supreme Court of Hawaii. Moreover, this Court presumes that no procedural bar exists unless the last state court rendering a judgment in the case states clearly and expressly that its judgment rests on such. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000) (noting that "[a]bsent a plain statement" in the decision of the state court that its rejection of a claim rests on a state procedural ground, federal courts "conclusively presume" otherwise).

III. THE DECISION BELOW REDUCED PETITIONER'S VESTED PROPERTY RIGHTS IN VIOLATION OF THE DUE PROCESS CLAUSE

The respondents in opposition level three attacks at Petitioner's due process claim. They first claim that at the time of the decision of the Supreme Court of Hawaii, Petitioner had no vested rights in the trust corpus. Second, they argue that, at the time of Mr. Damon's death, Hawaii applied not the majority view "modified per stirpes" rule described in the First Restatement, but rather the "strict per stirpes" rule described in the Restatement (Second) of Property, published in 1988.

Finally, they argue that retroactive application of new law by the judiciary (as opposed to a legislature) raises no constitutional concerns. None of these arguments affords a basis for denial of certiorari.

A. Petitioner's Interest In The Corpus Of The Trust Vested Before The Decision Below

The respondents in opposition argue that because the Damon will imposes a survivorship condition on taking from the corpus ("to all my issue who shall then be living," Pet. App. 7a), no rights in the corpus vested until the death of Petitioner's mother (Samuel Mills Damon's last surviving grandchild), on November 9, 2004.[2] *See* Opp. Br. 8. Therefore, they contend, Petitioner "had no vested right in 1995," when the Supreme Court of Hawaii changed the meaning of "per stirpes." Opp. Br. 8. Even assuming that is true, it is insufficient to defeat Petitioner's due process argument. Petitioner's and all the beneficiaries' rights in the corpus indisputably had vested by the time the Supreme Court of Hawaii issued its decision on February 16, 2006. That decision retroactively applied new law to diminish those rights in property, and it is that destruction of vested property rights from which Petitioner here seeks redress.

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[2] Joan Haig, the last surviving grandchild, died during the pendency of the appeal, thus triggering the termination of the Damon trust. The Hawaii Supreme Court was aware of her death, having consequently approved the motion for substitution of Michael Haig as the executor of the estate of his mother, Joan Haig. *In re Estate of Damon*, 128 P.3d 815, 826 (Haw. 2006) (*Damon II*). Despite having received notice that all surviving beneficiaries had survived until possession and were vested absolutely, the state court issued its Opinion destroying vested property rights fourteen months later. One month later, the state court denied Petitioner's Motion for Reconsideration without Opinion.

B. In 1924, Hawaii Indisputably Applied A Modified Per Stirpes Rule

The respondents in opposition half-heartedly argue that in 1924, Hawaii applied not the modified per stirpes distribution rule found in the Restatement (First) of Property, but rather the strict per stirpes rule described in the Restatement (Second) of Property, published in 1988. The Supreme Court of Hawaii made no effort whatsoever to ascertain the law controlling per stirpes distributions as it stood in 1924. And indeed, no published decision of the Hawaii courts is dispositive of this question. For at least two reasons, however, this Court can be sure that, when Mr. Damon instructed that the corpus be distributed "per stirpes," he intended a modified per stirpes distribution.

First, as the respondents in opposition acknowledge (at 9), the modified per stirpes rule described in the First Restatement was the majority view at the time of Mr. Damon's death.

Second, as respondents in opposition implicitly concede (at 9 n.9), the intestacy statute then in force required the stirpital root to be set at the level of oldest descendant alive at the time of distribution. *See* Br. of Resp't Michael E. Haig, *et al.* in Supp. of Pet. at 7. And Hawaii law is clear that, in a case of testamentary ambiguity, the intestacy statute controls. *Peters v. Vannatta*, 41 Haw. 249, 265 (1955) ("When the real intent of the testator is in doubt and the language of the will is consistent with such a distribution, there is a presumption in favor of the natural heirs of a distribution according to the statutes of descent and distribution.").

Against this background, this Court cannot accept the opposing respondents' contention that, in *Trust Estate of Dwight*, 909 P.2d 561 (Haw. 1995), the "state court merely announced Hawaii law as it always existed." Opp. Br. 10.

C. Retroactive Application Of New Law By A State Court Implicates Rights Secured By The Due Process Clause

Finally, addressing the substance of Petitioner's due process claim, the respondents in opposition claim that retroactive application of law by a state court raises no due process concerns and that Petitioner's constitutional claim accordingly lacks merit. Opp. Br. 10-12. The merits of a claim, of course, are not a relevant consideration at the petition stage. *See* Sup. Ct. R. 10. Even so, the respondents in opposition are clearly wrong. The decision below stands in stark conflict at least with this Court's decision in *Bouie*, and this case therefore warrants this Court's review. *See* Sup. Ct. R. 10(c).

It is beyond dispute that this Court held in *Bouie* that the Due Process Clause barred a state court from retroactively applying a new rule of law to the parties before it. *See* 378 U.S. at 362. The notion – greatly relied upon by opposing respondents – that "the Federal Constitution has no voice upon the subject" of whether a state court may apply a new rule of law retroactively to the parties before it, *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), has thus been upended and discredited.

Respondents in opposition seek to confine *Bouie* and its due process "voice" upon retroactive application of judicially-created rules of law to criminal cases. *See* Opp. Br. 12-13. In opposing respondents' view, inasmuch as *Bouie* holds that the retroactive application of a new rule of law violates due process, it represents nothing more than a rote application of the rule of lenity. Although *Bouie* is unquestionably a criminal case, nothing in that decision limited the due process principle there announced to the criminal context. Nor did this Court's decision in *Rogers v. Tennessee*, 532 U.S. 451 (2001), establish, as opposing respondents suggest (at 12-13), that *Bouie* has no application in civil cases. To the contrary, the Court in *Rogers* rejected the notion that *Bouie* merely applied the strictures of the Ex Post Facto Clause to judicial decision-making,

stating, "[o]ur decision in *Bouie* was rooted firmly in well established notions of *due process*," including "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." *Rogers*, 532 U.S. at 459. Indeed, that *Bouie* has application in civil cases was confirmed by the late Chief Justice just months before the decision in *Rogers*. In *Bush v. Gore*, Chief Justice Rehnquist argued, in reliance on *Bouie*, that the Florida Supreme Court's retroactive application of its new interpretation of state electoral law was invalid. 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring). The decision below thus stands in conflict with the "core due process concepts" announced in *Bouie* (*Rogers*, 532 U.S. at 459), and accordingly warrants this Court's review.

IV. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW

Respondents in opposition finally contend that this case does not "present[] a question worthy of this Court's time and attention." Opp. Br. 13. To be sure, this case involves a dispute among family members over the correct construction of a will. But the *question* presented by the petition – fundamentally, whether and to what extent the Due Process Clause limits the authority of state courts to apply retroactively new rules of state law – has implications that far transcend the particulars of this dispute. As amply demonstrated by the brief of *amicus curiae* Judicial Watch Inc., the decision below raises serious questions concerning "predictability in the application of the law and the protection of settled expectations and vested rights," which form the basis not only for our system of private property, but also for the rule of law in general. Br. of Judicial Watch, Inc. at 2. If the judgment of the Supreme Court of Hawaii is left undisturbed – if state courts are at liberty to re-write the law of property and retroactively apply the revision to the parties before it – it must follow that no testator's estate plan can be completely secure from judicial

reformulation. Indeed, if state courts have no constraint on their power to apply new rules retroactively other than their fidelity to the tradition of *stare decisis*, no interest in property based on a settled view of state law is secure. This Court's review is warranted – both to clarify the due process limits on state judicial power and to provide safety to property rights that are currently endangered by the erroneous view of the Supreme Court of Hawaii that there are no such limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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